IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1977

NO. **77-1218**

BERT CHARLES WHITTEN and
KENNETH WEICHMAN,
Petitioners,

vs.

THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the Court of Appeal, State of California, First Appellate District, Division Four

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The petition of Bert Charles Whitten and Kenneth Weichman respectfully shows that:

The Opinion Below

The opinion of the Court of Appeal of

the State of California, First Appellate District, Division Four, is unpublished. It is appended to this petition. The California Supreme Court rendered no opinion in denying the petition for a hearing.

Jurisdictional Grounds

The Court of Appeal filed its opinion on October 31, 1977. Petitioners filed for a hearing in the California Supreme Court on December 1, 1977. On December 29, 1977, the Court extended until January 27, 1978 the time for granting or denying a hearing. The Court denied a hearing on January 19, 1978.

28 U.S.C. §1257(3) confers jurisdiction to review the judgment below by writ of certiorari.

Questions Presented

1. Does a trial court in a criminal case have a duty to remove from the courthouse premises during the voir dire of jurors and trial proper, anti-defendant demonstrators with picket signs?

2. If not, must the court grant a change of venue under the circumstances?

Constitutional Provisions Involved

United States Constitution, Amendment VI:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed...."

Amendment XIV:

> "...[N]or shall any state deprive any person of life, liberty, or property, without due process of law...."

Statement Of The Case

Petitioners, who are serving prison sentences, and three other defendants, who were acquitted, were charged in Sonoma County with rape, enhancement allegations, and other crimes involving an eighteen year old named Heidi Moore. Petitioners were convicted of rape.

Trial was scheduled to commence on Monday, April 26, 1976. On Sunday, April 25, 1976, the Santa Rosa Press Democrat, the major local newspaper, carried a front page story headlined "Third Rape Ring Trial This Week." The subheading is "Linked to 12 Assaults." It says authorities claim the "bikers" have terrorized a dozen or more Sonoma Valley women. "This is the third time alleged members of the ring have been brought to trial but so far no major convictions." District Attorney Tunney is quoted that only three victims

could be convinced to testify and that most had been threatened and feared for their lives. One case resulted in an acquittal and the second, in which petitioners were among the defendants, was dismissed by the D.A. Also on April 25, the San Francisco Chronicle-Examiner, the major metropolitan Sunday paper, ran a story headlined "The Cry in Sonoma: These Rapes Must Stop." It says that a series of rapes has shaken Sonoma County and lead to charges that the criminal justice system isn't punishing those responsible. It refers to intense local interest and the attention of feminist groups throughout the Bay Area. It refers to the instant trial and says that the trial comes at a time when the subject of sexual assault is on the minds of nearly every Sonoma resident.

On April 26, a group of about forty feminist pickets came to the courthouse. They paraded and chanted and used a bullhorn in the courtyard, which is an integral part of the courthouse. They carried signs with messages like "No More Rape," "Rape Is A Man's Privilege," "Justice For (name of alleged victim)," "Justice For Women," and "Convict Rapists," One sign referred

to the earlier case against Weichman and Whitten that the District Attorney dismissed. The case was trailed until Tuesday, April 27, 1976.

Television showed the pickets at the courthouse and billed the trial as "the focal point of anger" for the women. It announced "last chance to stop rapists who have been getting off easy."

On April 27, 1976 defendants filed a motion for change of venue "...on the grounds that a fair and impartial trial cannot be had in this county because of adverse and inflammatory pre-trial publicity." (Clerk's Transcript, hereinafter "C.T.", page 83.) The memorandum of points and authorities refers to "... a demonstration of approximately forty women (which) took place at Sonoma County Hall of Justice in full view of the public. The demonstrators carried placards, one of which called for the conviction by names, of the defendants in this trial." (C.T., page 86.) Attached as exhibits were the Press Democrat and Chronicle-Examiner articles mentioned above, (C.T., pages 89 and 90), snapshots of the demonstrators (C.T., page 92), and an April 26,

1976 front page story from the Press Democrat with a large photograph of the pickets (C.T., page 93). The demonstrators covered their signs on the 27th until the venue motion was denied. Then, as jury selection commenced, they exposed the signs again.

On April 28, 1976 the venue motion was renewed and denied (C.T., page 96).

On May 7 and May 10, 1976 an evidentiary hearing on the venue motion was held. (C.T., pages 131-133 and Reporter's Transcripts of May 7 and May 10, 1976 proceedings.) On May 11, 1976 further points and authorities were filed by both sides. (C.T., pages 135-155.) Defendants relied mainly on *Maine v. Superior Court*, 68 Cal.2d 375 (1968), which in turn relies heavily upon *Sheppard v. Maxwell*, 384 U.S. 333 (1966) and *Estes v. Texas*, 381 U.S. 532 (1965). *Maine*, at 383-384. The prosecutor argued that under *Murphy v. Florida*, 421 U.S. 794 (1975), defendants must show actual prejudice to prevail. (C.T., pages 153-155.) The motion was denied. (C.T., page 134.)

The jury was impanelled on June 23, 1976. After selection of alternates, the trial proper began on July 7, 1976. At no time

during the trial was there any reference to threats by any of the defendants. Moreover, the court ruled that there was to be no reference to any other charges against the defendants. However, on July 9, 1976, a day of renewed activity by the pickets, the prosecutrix blurted out, in response to a "what happened then" type question, that when she told "Dineen" what happened, "Dineen" said these same guys raped her. A motion for mistrial was denied. (C.T., page 259.) Also, on July 9, the prosecutrix stated, in response to a question why she did not report the incident, that "...you never win rape cases anyway, because nobody believes you." This lead to one of the outbursts mentioned by the Court of Appeal. Another motion for mistrial was denied. (C.T., page 259 and Reporter's Transcript, pages 245-293.)

The main issue at trial was the consent *vel non* of the prosecutrix. The jury deliberated three and a half days. Defendants moved for a new trial because of an error of law in denying the mistrial motions and for insufficiency of the evidence. The motion was denied. (C.T., pages 388-407.)

Petitioners urged in their brief in the

Court of Appeal, at pages 65 through 67, and in their petition for a hearing in the California Supreme Court, at pages 67 through 71, that the pickets deprived them of due process within *Sheppard* and *Estes*, *supra*.

Reasons for Writ

Senate Bill 1437, 95th Congress, 1st Session, §1328 makes picketing, parading, displaying a sign or using a sound amplifying device on the federal side under circumstances similar to these a crime. This reflects the almost universal sense that such conduct is wrong and designed to improperly influence the proceedings. Yet, the courts of California cannot even detect a due process violation in this situation. It is, therefore, respectfully submitted that the intervention of this Honorable Court is necessary to preserve due process and Sixth Amendment rights.

Conclusion

For the foregoing reasons, it is respectfully submitted that the petition

for writ of certiorari should be granted.

DATED: February 15, 1978.

Respectfully submitted,

ROMMEL BONDOC
Attorney for Petitioners

Copy of the Opinion

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. BERT CHARLES WHITTEN and KENNETH WEICHMAN, Defendants and Appellants.	1 Crim. No. 16042 (Sup. Ct. No. 7850-C)

Appellants were convicted following a jury trial of violation of Penal Code section 261 (forcible rape).[1/]

I

Appellants' first contention is that the trial court erred in denying their

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1/ The three other defendants were acquitted either by the jury or by the court pursuant to Penal Code section 1118.1.

numerous motions for change of venue pursuant to Penal Code section 1033.[2/]

The test stated in *Maine v. Superior Court* (1968) 68 Cal.2d 375, is that "[a] motion for change of venue or continuance shall be granted whenever it is determined that because of the dissemination of potentially prejudicial material, there is a *reasonable likelihood* that in the absence of such relief, a fair trial cannot be had.... A showing of actual prejudice shall not be required." (*Maine*, at p. 383; emphasis added.) Appellate courts must make an independent evaluation of the circumstances to determine whether a

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2/ "§1033. In a criminal action pending in the superior court, the court shall order a change of venue:

"(a) On motion of the defendant, to another county when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county.

"(b) On its own motion or on motion of any party, to an adjoining county when it appears as a result of the exhaustion of all of the jury panels called that it will be impossible to secure a jury to try the cause in the county."

trial court judge's denial of a motion for a change of venue deprived defendant of a fair and impartial trial. (*Maine*, at p. 382; *People v. Tidwell* (1970) 3 Cal.3d 62, 68; *People v. Salas* (1972) 7 Cal.3d 812, 817, cert. den. 410 U.S. 939.) The factors to be considered are : (1) the nature and gravity of the offense; (2) the size of the community; (3) the status of the defendant in the community; (4) the popularity and prominence of the victim; and (5) the nature and extent of the news coverage. (*People v. Witt* (1975) 53 Cal.App.3d 150, 170, cert. den. 425 U.S. 916; *In re Miller* (1973) 33 Cal.App. 3d 1005, 1011.) When this issue is raised on appeal, inferences of possible prejudice may be refuted by the actualities of voir dire and of trial. (*People v. Barger* (1974) 40 Cal.App.3d 662, 670; *People v. Quinlan* (1970) 8 Cal.App.3d 1063.)

In considering the facts of this case against these rules of law, we conclude that the trial court did not err in denying appellants' motions for a change of venue. First of all, while the crime in this case is certainly serious and distasteful, it is not senseless and brutal

murders as in *Maine* and *Frazier v. Superior Court* (1971) 5 Cal.3d 287. Second, Sonoma County, as one of the nine metropolitan bay area counties with a population close to 250,000 persons, has not been isolated from violent crimes. Third, the defendants were not strangers to the community, but longtime residents. The victim, on the other hand, had recently arrived in Sonoma County from Los Angeles, Lastly, while the press coverage of this trial was extensive, we note that of the 12 persons selected, half of them stated that they had not read anything in the newspaper, heard any news on television or discussed this case with anyone. The remaining jurors' exposure to the case was negligible. Ruby Baller "faintly" recalled reading something about the case, but she "didn't pay much attention to it." Vincent McDonald read a small article in the Press Democrat that stated that the jury had been selected for the case. Jack George was told by an employee that a rape case was being tried and that he may be selected to sit as a juror. He also heard that there were demonstrations and noticed one woman with a brown armband. Alvin Lee

believed he read a small article a couple of months ago about a rape trial but he couldn't remember anything about it. June Dockum was told by a person at work that "there is a rape trial going on." She also overheard a conversation of students about rape demonstrations. Arlene Bushman stated that she may have glanced over an article on rape in Sonoma County but she didn't pay much attention to it. "The fact that numerous...jurors...did not have strong recollections of the news media's coverage of the case...demonstrates the unlikelihood of there having been undue publicity or inflammatory reporting of the case by the press."[3/] (*People v. Hathcock* (1973) 8 Cal.3d 599, 620; *People v. Salas, supra*, 7 Cal.3d 812.) Also significant is the fact that the judge *individually* voir dired hundreds of potential jurors over a period of 30

3/ We note that this case did become the focus of political manueverings by both womens' groups and members of the community who were dissatisfied with the manner in which the district attorney was handling rape cases. However, this factor alone is not determinative on whether to grant a change of venue motion.

days.[4/]

II

Appellants contend that they were denied due process and a fair trial because feminist groups demonstrated outside the courtroom and by their presence in court during the trial. In so arguing, appellants rely on *Estes v. Texas* (1965) 381 U.S. 532 and *Sheppard v. Maxwell* (1966) 384 U.S. 333.

In both of these cases, television cameras and reporters so filled the courtroom that all sense of judicial control and decorum were lost. In contrast, the judge in this case did not allow the demonstrators outside the courthouse and numerous spectators at the trial to intrude upon the proceedings. The judge quickly controlled two outbursts during the trial. On July 9, there was an outburst in the courtroom in response to a comment by the victim on not winning rape cases. The judge warned the crowd to remain silent

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4/ We note that of the four defendants, the jury acquitted two of them on all counts and acquitted each appellant of four counts and convicted each on just one. The jury further found that the appellants had not acted in concert.

and control their emotions. The second outburst occurred outside the presence of the jury removing all spectators from the courtroom except for press representatives.

The judge was equally careful to limit the jury's exposure to the demonstrators. When a crowd had congregated outside the courtroom during one day's proceedings, the judge used an alternative route for taking jurors from the courtroom.

In view of these facts we do not find that the court proceedings in this case denied appellants a fair trial.

III

Appellants' last contention is that there is insufficient evidence to support the convictions of Whitten and Weichman.

In *People v. Bassett* (1968) 69 Cal.2d 122, it was stated that "when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury." (*Id.*, at p. 138.) "[Substantial evidence clearly implies that] it must be reasonable in

nature, credible, and of solid value." (At p. 139.) In California, convictions of a sex crime may be sustained upon the uncorroborated testimony of the prosecutrix. (*Ballard v. Superior Court* (1966) 64 Cal.2d 159, 171; *People v. Stevenson* (1969) 275 Cal.App.2d 645, 650, cert. den. 397 U.S. 1014.)

Appellants in essence ask this court to reweigh the credibility of the witness at trial and to reverse the judgment. As questions bearing on the credibility of rape victims are for the jury to determine (*People v. Blagg* (1970) 10 Cal.App.3d 1035, 1040; *People v. Headlee* (1941) 18 Cal.2d 266, 267-268) appellate courts will uphold the judgment unless it is "based upon evidence inherently improbable[.] [T]estimony which merely discloses unusual circumstances does not come within that category. [Citation.] To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony

which is subject to justifiable suspicion do not justify the reversal of a judgment...." (*People v. Thornton* (1974) 11 Cal.3d 738, 754, cert. den. 420 U.S. 924.) "To be improbable on its face the evidence must assert that something has occurred that it does not seem possible could have occurred under the circumstances disclosed." (*People v. Mayberry* (1975) 15 Cal.3d 143, 150.)

Appellants have not referred the court to any portions of the victim's testimony which they find "inherently improbable." Our reading of the record does not disclose any basis for such a conclusion. In view of these facts and the law stated above, we find that there was substantial evidence to support the rape convictions.

The judgment is affirmed.

_____
Caldecott, P. J.

We concur :

_____
Rattigan, J.

_____
Emerson, J.*

* Assigned by the Chairman of the Judicial Council.

[Filed October 31, 1977]

The Judgment

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

January 19, 1978

I have this day filed Order

Hearing Denied

In re : 1 Crim. No. 16042

People

vs.

Whitten and Weichman

Respectfully,

G. E. Bishel
Clerk